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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-539

CHERYL DONALDSON NICHOLS, *Petitioner*

v.

WOODWARD & LOTHROP, a CORPORATION, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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Cheryl Donaldson Nichols prays that a writ of certiorari issue to review the judgment of the District of Columbia Court of Appeals, entered on August 12, 1974, denying "Appellant's Petition for Re-hearing", for said action denied her her civil rights, her right to a jury trial in violation of the 7th Amendment and denial of "due process" under the 5th and 14th Amendments of the Constitution.

OPINIONS BELOW

On November 24, 1972, the Superior Court for the District of Columbia entered a judgment for the defendant, Woodward & Lothrop. An appeal was noted on December 4, 1972 and on July 19, 1974, a panel of the District of Columbia Court of Appeals affirmed the judgment of the lower court. A petition for reconsideration and a petition for a hearing "en banc" was denied on August 12, 1974.

JURISDICTIONAL STATEMENT

The judgment of the District of Columbia Court of Appeals was entered on August 12, 1974. The jurisdiction of this Court is invoked under 28 U.S.C.A. 1257 (3).

QUESTIONS PRESENTED

1. In that the courts are all in accord that only certain categories of "prior convictions" are admissable to impeach witnesses, and further that when such testimony is introduced the jury is to be instructed that such testimony is to be used in only a very limited way, was it a violation of the Petitioner's "due process" rights to admit into evidence, over objection, a prior juvenile indiscretion, not a conviction, and then fail to instruct the jury as to the very limited way it was to consider such testimony?

2. Was it a violation of the Petitioner's rights under the 5th, 6th and 7th Amendments to the United States Constitution, for the Court to deny her a right to seek damages for "malicious prosecution" because she failed to establish lack of probable cause for her initial arrest, when the evidence supporting such complaint was separate and distinct from the evidence surrounding the initial arrest?

STATUTES INVOLVED

The 5th, 6th and 7th Amendments to the Constitution and 14 District of Columbia Code 305.

STATEMENT

The Plaintiff in the trial court sued in a two count Complaint for (1) false arrest and (2) malicious prosecution.

The jury returned a verdict for the defendant on both counts and on December 4, 1972 the Plaintiff noted an appeal on only the second count of the Complaint, the "malicious prosecution" count.

The District of Columbia Court of Appeals, in an opinion dated, July 19, 1974 affirmed the opinion of the lower court and the Court denied Appellant's motions for 1) consideration and 2) and for an en banc hearing on August 12, 1974.

The Complaint was predicated upon an arrest of the Petitioner, Cheryl Donaldson Nichols, on April 14, 1971 at the Woodward & Lothrop store in downtown Washington, D.C.

A store detective had observed the Petitioner pick up a man's sweater on the second floor of the store, take the sweater to the basement, where he observed her in discussion with another person (later identified as Mrs. Sheets, a saleswoman for Woodward & Lothrop) to whom she showed the sweater. The detective was not close enough to hear the conversation. He next saw the Petitioner take the sweater and proceed toward the escalator and, before arriving at the escalator, saw her throw the sweater under a counter. At this point the arresting officer, Armstrong, thought she was stealing the sweater (Tr. 215) and placed her under arrest when she arrived on the first floor of the store without the sweater.

The Petitioner was taken to the Security Office on the Eighth Floor (Tr. 202) at which time she informed the officers that the person they saw her speak with in the basement was a saleswoman, Mrs. Sheets, to whom she tried to return the sweater. Both Mrs. Sheets and the Petitioner represented that the Petitioner had tried to return the sweater to Mrs. Sheets (Tr. 161).

Shortly after the arrest, Mr. Loomis, head of defendant's security, had heard the conversation about Mrs. Sheets (Tr. 98).

A police form "P.D. 163" was completed by the arresting officer at "2:30 or 3" (Tr. 202) and bore the name "Ruby Sheets" as a witness.

Later that day the Petitioner was taken from the store by Police Cruiser to the 5th Precinct for processing and questioning; then taken in the back of a police van to Police Headquarters for fingerprinting and mugging, and later that evening was released on her personal recognizance and ordered to report to court on April 20, 1971.

On that date she was arraigned and assigned a trial date of June 3, 1971. On June 3 the case was continued to June 17 then to July 12 and finally the criminal case was tried on July 23, 1971.

At the trial, Mrs. Sheets testified that the Petitioner had tried to return the sweater to her and the court entered a judgment of "not guilty".

At the civil trial of this matter, the defendant, over objection of Petitioner, was permitted to interrogate the Petitioner, on cross-examination, about an incident which occurred when the Petitioner was fifteen years of age (some six years previously) involving the suspected theft by her of two rings valued at $1.50 each. The court ruled: "I will admit on cross-examination the evidence properly asked of the defendant since it bears on the question of amnesty" (Tr. 167) The Court further said: "I think I can instruct them that it has been received for the question of damages. It may also go to her credibility. I think it does . . . ." (Tr. 168) No instruction was given as to why it was admitted.

On appeal, Petitioner asserted that there was no evidence to support the finding of the jury on the "malicious prosecution" count of the Complaint.

The Court of Appeals, affirming the judgment, said inter alia:

"A finding that an arrest based upon probable cause traditionally absolves a defendant from liability for a subsequent prosecution . . . . In arguing that the evidence was insufficient to support the jury's verdict on the malicious prosecution issue, appellant in effect contends that no reasonable man could have concluded that the prosecution was warranted, notwithstanding the lack of a challenge to the verdict in favor of the store on the false arrest count. **However, when we conclude that a probable cause issue properly has been submitted to the jury – with respect to either the initial arrest or the subsequent prosecution based thereon– it is not our role to review its findings."**

REASONS FOR GRANTING THE WRIT

1. The Petitioner was deprived of her "due process rights" under the 5th Amendment, in that she was permitted to be cross-examined, over objection, about a juvenile indiscretion, involving the possible theft of two rings valued at $3.00, some six years previously, when she was fifteen years of age.

On cross-examination, over objection, counsel for Woodward & Lothrop asked the following questions and received the following answers:

"Q. I show you what has been marked as Defendant's Exhibit No. 1., for identification, and I ask you would you take a moment and look through that exhibit, please? Now Miss Donaldson, I have given you what has been marked as Defendant Exhibit No. 1. Do you recall what instance that refers to?

A. Yes, sir.

Q. There is an instance that refers to what occurred at the Hecht Company?

A. Yes, sir.

Q. And it involved two rings?
A. Yes, sir.
Q. You took them outside the store?
A. No, sir.
Q. Where did you take them?
A. I wasn't outside the store with them.
Q. Were you stopped by the store detectives at the Hecht Company?
A. I was stopped by a female.
Q. And she took you and subsequently released you to your parents?
A. Yes, sir. (Tr. 172 and 173)

Because the complained of act was that of a juvenile it should not have been admissable.

> "Appellant relies in this regard upon the provisions of Section 2308 (d) of Title 16 of the D.C. Code, which are designed to relieve the proceedings in the Juvenile Court from the consequences which customarily accompany conviction of crime in a tribunal of general criminal jurisdiction. The Government points out, however, that that statute is in terms addressed to adjudications made by the Juvenile Court in the exercise of its jurisdiction, and that it has no application when that jurisdiction has been expressly waived by the Juvenile Court. Here, appellant was waived out of the Jurisdiction of the Juvenile Court, and the District Court was authorized to, and did, try and sentence him as an adult." *Luck v. United States, 121 U.S.Apps.D.C. 151, 348 F.2d 763. (1965) at page 154.*

Even if the "impropriety" was that of an adult it would not have been admissable. The law is clear that only "prior convictions" are admissable and these for the limited purpose of "impeachment."

"As a bow to this view the rule permitting the evidence to be admitted requires the court to instruct the jury to consider the evidence only in determining the weight to give the defendant's testimony should he testify, and not otherwise in reaching their verdict. The difficulty lies in the grave uncertainty, if not the impossibility that the jury can divide their minds in this way and remain uninfluenced except as instructed. Realizing this, and because of it, the accused sometimes will not take the stand." *U.S. v. Bailey, 138 U.S.Apps.D.C. 242, 426 F.2d 1236 at page 245.*

"(7) The appellant also argues that the prosecutor, in his closing statement to the jury, and the trial judge, in his instructions to the jury, made reference to the narcotics conviction and that these references inflamed the jury to the prejudice of the defendant. We do not agree. The prosecutor's interrogation, his argument to the jury and the court's instruction on the prior conviction were carefully stated so that it was quite clear that the jury was to consider the prior offense solely on the issue of the credibility of the witness." *U.S. v. McIntosh 138 U.S.Apps.D.C. 237 (1970).*

It must be conceded by all, including the advocate who introduced the "prior juvenile indiscretion", that it had the intended prejudicial effect on the jury.

The cases are in accord, that only prior convictions and not prior indiscretions are admissable for impeachment. That even when prior convictions are admitted, the jury must be instructed as to the limited purpose for the introduction.

It follows then that Petitioner's "due process" rights were violated. *See Colon Rosich v. People of Puerto Rico, 256 F.2d 393 (1958).*

The Court should grant the writ because the bench and the Bar continue to indicate the problems they have with whether or not to admit such testimony and, assuming they admit it, how the jury is to consider the evidence. *See: Luck v. U.S., U.S. v. Bailey and U.S. v. McIntosh cited supra and Nash v. U.S. 54 F.2d 1006 (2nd Cir.) cert. denied, 285 U.S. 556, 52 S. Ct. 457, 76 L. Ed. 945 (1932), Krulewitch v. United States, 336 U.S. 440, 69 S. Ct. 716, 93 Law Ed. 790 (1949); Bruton v. United States 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 476 (1968).*

The problem of prior convictions is one that continues to vex the courts in their search for truth.

> "As its language indicates, that law (Sec. 305) was put on the books almost 70 years ago for the primary purpose of removing the ancient common law disqualification of persons with criminal records from testifying in either civil or criminal cases. There is apparently no relevant legislative history, so we can only speculate as to why the attainder continued to some degree in the form of permissive employment of the last conviction to impeach credibility. The question that now should be asked is whether it should continue further at least in the case of criminal defendants who wish to testify in their own defense." *Blakney v. U.S., 130 U.S. Apps.D.C. 87, 397 F.2d. 648 (1968).*

It is to be reiterated that in the instant case the evidence introduced was not even that of a previous conviction.

> "Significantly, no less an authority than Professor Wigmore not only participated in the formulation of the proposal of the American Law Institute but approved its final form.
>
> These proposals carry the implication that an instruction to the jury to consider the evidence only as it bears on credibility is inadequate to sustain the rule as now admin-

istered. Judge Learned Hand referred to such ineffectiveness many years ago in another connection, characterizing such an instruction as no more than a 'recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else.

* * * And Justice Robert H. Jackson declared in Krulewitch v. United States, 336 U.S. 440 (concurring opinion) 'The naive assumption that prejudicial effects can be overcome by instructions to the jury * * * all practicing lawyers know to be unmitigated fiction." *U.S. v. Bailey, 138 U.S.Apps.D.C. 247 (1970).*

In the instant case, no "limiting instruction was given to the jury."

2. For a court to deny civil relief to a person on a complaint for "malicious prosecution" because she has failed to prove lack of probable cause for the preceding arrest, when the factual basis of the new "false arrest" and the "malicious prosecution" are separate and distinct, is a violation of that person's rights under the 5th, 6th and 7th Amendments to the Constitution.

"It is well settled that an action arising out of tortious conduct is a vested property right which is protected against impairment by the action of a state by virtue of the due process clause of the 14th Amendment of the United States Constitution." *Terracciona v. Magee, 148 A.2d 68 (1959) at page 75.*

"The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government." *Chambers v. Baltimore and Ohio Railroad, 207 U.S. 142 (1970). at page 148.*

The instant court of appeals decision is oblivious to the fact that the Petitioner had two separate and distinct causes of action; (1) false arrest and (2) malicious prosecution; and the right to each of these cause of action is protected by the 7th Amendment.

Whether or not there was "probable cause" for the arrest involves the transactions and what was observed by the arresting officer prior to the arrest. By not appealing the jury's verdict on this count the Petitioner agreed that however innocent the actions of the Petitioner, a reasonable and prudent police officer could have inferred that she was in fact stealing the sweater.

However, the "probable cause" for the prosecution is something that transpired from that point in time immediately after the arrest on April 14, 1971 to that moment in time on July 23, 1971 when the Court entered a finding of "not guilty."

Subsequent to the arrest and prior to the acquittal the defendant, Woodward & Lothrop, knew that the Petitioner was not stealing the sweater but had in fact, attempted to return it to the agent of the defendant, Ruby Sheets. Even possessed of this knowledge, Woodward & Lothrop proceeded with the arrest, finger-printing, mugging and criminal prosecution of the Petitioner. This fact was never denied or contested by Woodward & Lothrop.

The specific acts perpetrated by Woodward & Lothrop, after they knew the Petitioner was not guilty of larceny are as follows:

1. Continued to detain Petitioner.
2. Filled out form P.D. 163 listing the name "Ruby Sheets." as a witness.
3. Had the Petitioner transported in a police car to the 5th Precinct. where she was further detained and processed.

4. Had her transferred by police van to Police Headquarters where she was mugged and finger-printed and released later that evening to appear in court on April 20, 1971.

5. On that date, when the Petitioner refused to sign a "civil release" for Woodward & Lothrop; she was charged with "larceny" and arraigned. (Tr. 153)

6. She appeared for trial on June 3, 1971; but the case was continued; she appeared again on June 17, 1971 and on July 12, 1971 and the case was continued on both of those dates. The trial was finally held on July 23, 1971.

7. At the trial Mrs. Sheets had to be called as a witness by the Petitioner, in spite of the fact that her testimony was known to Woodward & Lothrop since the date of the arrest and this fact was part of the police record from that date.

In light of all of the foregoing, the Court by holding that the facts prior to the arrest as they appeared to the arresting officer, are sufficient to justify a criminal prosecution over a peroid of more than three months, when Woodward & Lothrop was in possession of all the facts, and they all clearly established the innocense of the Petitioner, was to deny the Petitioner "due process".

. . . "And due process of law under the fourteenth Amendment, and we may safely assume that the same might be said with reference to due process of law under the fifth Amendment . . . requires that action by a state through any of it's agencies must be consistent with the fundamental principles of liberty and justice which lie at the base of our civil and political institutions, which not infrequently are designated as the 'law of the land'. *Buchalter v. People of State of New York, (1943) 319 U.S. 427, 63 S. Ct. 1129.*

The Court of Appeals decision herein unconstitutionally denied the Petitioner her right to prosecute her claim for damages for "malicious prosecution".

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 7045

CHERYL DONALDSON NICHOLS, APPELLANT,

v.

WOODWARD & LOTHROP, INC., APPELLEE

Appeal for the Superior Court of the District of Columbia

(Argued September 27, 1973 Decided July 19, 1974)

Thomas M. O'Malley, with whom *Michael F.X. Dolan* was on the brief, for appellant. *William W. Hays* also entered an appearance for appellant.

Francis X. Quinn for appellee.

Before KELLY and HARRIS, *Associate Judges*, and PAIR, *Associate Judge, Retired.*

HARRIS, *Associate Judge:* An action for false arrest and malicious prosecution was brought by appellant based upon an incident which occurred in the Woodward & Lothrop department store at 10th and F Streets, N.W. The case was tried before a jury, which returned a verdict for defendant-appellee on both counts. Appellant's motion for a new trial on the count of malicious prosecution was denied. Mrs. Nichols now argues princi-

pally (1) that there was no evidence to support the verdict in favor of appellee on the issue of malicious prosecution, and (2) that it was error for the court to admit evidence that she, while a juvenile, had been apprehended for shoplifting some six years earlier. We affirm.

Appellant was arrested by private security officers while shopping with her sister. Officer Benjamin Armstrong saw appellant pick up a sweater from a display rack in the men's department on the second floor, and take it to the basement without paying for it. He followed her, and observed her try on raincoats, one of which she purchased. She then handed the sweater to another female shopper, who gave it back to her. The security officer testified that appellant then started towards the escalator, with the sweater placed over her arm, under her coat. By that time, Officer Armstrong had been joined in his surveillance by another security officer. Armstrong testified that appellant then "looked back to her left side and saw [the other officer]. She pulled the sweater from under her coat and threw it on the floor under a bra counter. At this time she was headed for the down escalator. So she then turned and came back to go to the up escalator. At this time I cut out and followed her up to the first floor where I stopped her." At a later trial, a jury found appellant not guilty of petit larceny.

While we are obliged to consider the facts in the light most favorable to appellee, fairness calls for us to recite briefly appellant's version of what happened. She testified that she took the sweater to the basement to show her sister, with the thought that they might purchase it as a birthday present for their father. When her sister rejected the idea, appellant tried to leave the

sweater with a saleswoman in the basement. That testimony was confirmed by the saleswoman, who testified that she told appellant to take the sweater back to the second floor. Appellant, however, was anxious to get back to work. (She was on her lunch hour), and she said that she left the sweater on a counter in the basement simply to avoid returning to the second floor.

The jury's verdict for Woodward & Lothrop was in effect a finding that there was probable cause for both the arrest and the subsequent prosecution.[1] Appellant has not challenged the verdict on the false arrest count. Essentially, her claim before us is that the department store's security personnel had actual or constructive knowledge of appellant's lack of criminal intent (reflected by her apparent effort to return the sweater to the saleswoman in the basement), and hence that Woodward & Lothrop had an obligation to seek to prevent the later criminal prosecution by the United States Attorney's office.[2] Thus, she argues, although the original arrest may have been defensible, the subsequent prosecution was without justification.

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[1] Where the facts are in dispute, the issue of probable cause (assuming proper instructions) is for the jury. *Smith v. Tucker, D.C. App., 304 A.2d 303 (1973); Wolter v. Safeway Stores, Inc., 80 U.S.App.D.C. 357, 153 F.2d 641, cert. denied, 329 U.S. 747 (1946).*

[2] The record indicates that all persons arrested at the store on suspicion of larceny were turned over to the Metropolitan Police Department to be charged formally, and that there was no policy providing for an internal review by the store's security personnel of the merits of particular cases. Woodward & Lothrop's Director of Security testified that he had no knowledge of any conversation between appellant and the saleswoman.

A finding that an arrest was based upon probable cause traditionally absolves a defendant from liability for a subsequent prosecution.[3] *Smith v. Tucker, D.C. App., 304 A.2d 303 (1973); Prieto v. May Department Stores Co., D.C.App., 216 A.2d 577 (1966).* In arguing that the evidence was insufficient to support the jury's verdict on the malicious prosecution issue, appellant in effect contends that no reasonable man could have concluded that the prosecution was warranted, notwithstanding the lack of a challenge to the verdict in favor of the store on the false arrest count.[4] However, when we conclude that a probable cause issue properly has been submitted to the jury—with respect to either the initial arrest or the subsequent prosecution based thereon—it is not our role to review its findings. D.C. Code 1973, 17-305-(a). This is such a case.[5]

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[3] *In Prieto v. May Department Stores Co., D.C.App., 216 A.2d 577 (1966),* a case presenting a rather similar factual situation, we stated (at 579):

> [T]he action of the detective must be reviewed from what he observed and not from what may have been in the mind of the plaintiff. "probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed."

[4] The Circuit Court stated in *Wolter v. Safeway Stores, Inc., supra n. 2, 80 U.S.App.D.C. at 358, 153 F.2d at 642:*

> . . . . the rule is that if the existence of probable cause must be determined from conflicting evidence, the question is for the jury; but if the facts from which the presence or absence of probable cause is to be ascertained are undisputed or clearly established, the question is one of law for the court.

[5] We observed in *Prieto, supra:* "There is no material distinction between reasonable grounds for detention in false imprisonment and probable cause in malicious prosecution." 216 A.2d at 578. The jury's verdict on the false

Basically, appellant urges us to conclude that the prosecution of her petit larceny (necessarily conducted by the government rather than Woodward & Lothrop) became unwarranted once she gave the security officer a plausible explanation for conduct which otherwise was obviously highly suspicious. The unspoken premise of such an argument is that the officer was obliged to believe the explanation of a suspected shoplifter. We neither may nor are disposed to adopt such a suggestion.[6] *Prieto v. May Department Stores Co., supra; see also M.A.P. v. Ryan, D.C.App., 285 A.2d 310, 315 (1971).*

Appellant also contends that reversible error was committed when the court permitted Woodward & Lothrop's counsel to cross-examine her about an incident which occurred some six years earlier, when she was 15. Appellant then was in a Hecht Company store. Apparently she placed two rings, with a total value of $3.00, on her finger and sought to leave the store without paying for them. She was apprehended by a security officer who prepared a report on the incident which was signed by appellant prior to her release to her parents. [7]

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arrest count is supported by the record, which provides independent support for the verdict in favor of appellee on the count of malicious prosecution.

[6] We note without intimating that testimony with respect thereto necessarily would have been admissable, that there is no indication that appellant sought to have her petit larceny case diverted from the criminal justice process by giving the government advance notice of the expected exculpatory testimony of the store's basement saleswoman.

[7] The police were not called on that occasion, nor was a delinquency proceeding initiated. Hence, the use of the report does not raise a question as to the scope of the statutory requirement of confidentiality in juvenile delinquency proceedings. *See D.C. Code 1973 16-2330.*

As the trial progressed, counsel for the store stated his desire to cross-examine Mrs, Nichols concerning that occurrance. Appellant's counsel objected, but the court concluded that such evidence could be "received" for the question of damages. It may also go to her credibility." The Hecht Company report was identified by defense counsel, and appellant was asked about the episode. She confirmed it. Defense counsel concluded his brief cross-examination on the subject, and rested. Mrs. Nichols' counsel then introduced the report into evidence.

In her amended complaint on the count of malicious prosecution, appellant sought damages, in part, for "great pain and mental anguish" and for "humiliation, mortification, indignity, disgrace and shame". We conclude that her prior involvement with the Hecht Company security officer was relevant on the issue of damages, and hence that evidence thereof properly was admitted by the trial court.[8] *See Allen v. Vogue Amusement Co., 377 S.W. 2d 805 (Ky. 1964).*

The being no error requiring reversal, the judgment below is:

Affirmed.

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[8] We do not reach the question whether the introduction into evidence of the Hecht Company report by Mrs. Nichols' own counsel constituted a waiver of the prior objection to Woodward & Lothrop's cross-examination on the subject. *But see Williams Bros. Grocery Co. v. Blanton, 124 S.E.2d 479 (Ga. 1962); Texas Indemnity Ins. Co. v. Desherlia, 237 S.W.2d 715 (Texas 1951); In re Forsythe's Estate, 22 N.W.2d 19 (Minn. 1946); C. McCORMICK, LAW OF EVIDENCE, 55, at 129 (1954); 1 WIGMORE ON EVIDENCE 18 (3d ed. 1940). Cf. Jones v. State, 109 A.2d 732 (Md. 1954); Bice v. Birk, 435 S.W.2d 734 (Mo. 1968); State v. Tiedemann, 362 P.2d 529 (Mont. 1961).* Similarly, we do not find it necessary to determine whether such evidence would have been admissible independently as to appellant's credibility.

PAIR, *Associate Judge, Retired,* concurring: I concur in the result because, absent a clear record showing to the contrary, it must be presumed that the cross-examination of appellant respecting her juvenile indiscretion was permitted only on the issue of damages. [1]

[1] Had such cross-examination been permitted on the issue of appellant's credibility, it would have been, in my opinion, reversible error even if there had been no objection.